

The Supreme Court's Decision in *NC Board of Dental Examiners v. Federal Trade Commission*

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Presented by: Lawrence Moore
Counsel for NC State Bar, among others, as
amici curiae in Dental Board case

NC Dental Board Case: *Background*



NC Dental Board Case: *State Action Doctrine*

- *Parker v. Brown* (1943)
 - California raisin production “proration” scheme overseen by state board
 - Supreme Court carved out exception from federal antitrust laws “to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity”



NC Dental Board Case: *Prior State of the Law*

1. State entities and officials that act for the State in its sovereign capacity are *ipso facto* immune from the antitrust laws. *Hoover v. Ronwin* (1984).
2. Private entities given authority to restrict competition: *California Retail Liquor Dealers Ass'n v. Midcal* (1980): Immune if two-part test met:
 - Anticompetitive policy must be clearly articulated & affirmatively expressed by state AND
 - Actions of group authorized to implement state policy must be “actively supervised by the state”
3. Municipalities “are not themselves sovereign”; they are immune when they act under a “clearly articulated and affirmatively expressed state policy to displace competition.” *Town of Hallie v. City of Eau Claire* (1985).
 - Footnote: “Likely” State Agencies, too.

NC Dental Board Case: *Background*

- Dental Board is, by statute, an “agency of the State”
 - Consists of 6 licensed dentists (elected by peers), 1 hygienist (elected by peers), 1 citizen (appointed by Governor)
- Practice of dentistry includes:
 - “Removing stains, accretions or deposits from the human teeth”
- Practice of dentistry by any person not duly licensed declared inimical to health, safety, welfare... may be enjoined in action brought by Attorney General, district attorney, Board of Dental Examiners, or resident citizen

NC Dental Board Case: *Background*

- Dental Board
 - Starting in 2006, Board issued 47 cease-and-desist orders to non-dentists about whitening, explaining criminal penalties for “practice of dentistry”
 - In 2010: FTC charged Board with violating FTC Act (citing anticompetitive and unfair method of competition) & Sherman Act
 - Subsequently FTC prevailed before administrative law judge (who found no health/safety issues), full commission and federal Court of Appeals for Fourth Circuit

NC Dental Board Case: *FTC case*

- Cited evidence of concern with competition:
 - Ads with prices circled sent in (\$500 v. \$100), complaint of cheapening of profession. Claimed few health concerns.
 - Cited loss in bling teeth jewelry case on practice of dentistry.
 - Right after that, started sending cease-and-desist letters.
- Dental Board did not create rule or bring action in court; sent out cease-and-desist letters.
- FTC viewed statute as silent on whether whitening was “practice of dentistry” although dentistry was defined to include the removal of “stains, accretions or deposits.”

NC Dental Board Case: *Background*

Supreme Court Argument:

- Kagan: Can a state transform a trade association into a regulatory body with immunity?
- Breyer: I don't want bureaucrats overseeing brain surgeons.
- Kennedy: I'd advise practitioners never to serve on a board if FTC won because of danger of treble-damages suit.

NC Dental Board Case: *Supreme Court Decision*

- State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. Immunity for state agencies... requires more than a mere facade of state involvement.” States must “accept political accountability for anticompetitive conduct they permit and control.”
- Where regulatory power delegated to active market participants, To immunity requires
 - Clear articulation.
 - Active state supervision

NC Dental Board Case: *Supreme Court Decision*

- Key Factors—
 - “The Board’s concern did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is ‘the practice of dentistry.’”
 - “[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state action immunity is disfavored...’”
 - Court troubled by possibility that the Dental Board could be motivated by economic self-interest, consciously or not.
 - The FTC and courts were troubled by the the lack of rule-making prior to taking enforcement action.

NC Dental Board Case: *Decision*

Dissent

- Would have treated Board as “state agency” and thus within *Parker* (based on history, policy, and trappings)
- Cites uncertainties in changing composition of licensing boards
 - How many “market participants” are a “controlling number”?
 - Who is a “market participant”? And what scope defines the market?

NC Dental Board Case: *Open Issues*

To which decisions does *NC Dental* apply?

- Licensing/Applications?
- Discipline?
- Ethics?
- Unauthorized practice?

Does 11th Amendment Immunity apply? (explicitly left open)

What constitutes “control” by market participants?

NC Dental Board Case: *Open Issues*

What constitutes Active Supervision?

- The Court described it in different ways:
- Slip op. at 9 (state officials must “have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”)
- Slip op. at 10 (“requiring the State to review and approve interstitial policies made by the entity claiming immunity.”)
- Slip op. at 18 (“supervisor must have the power to veto or modify particular decisions to ensure that they accord with state policy.”)

NC Dental Board Case: *Open Issues*

- What constitutes Active Supervision?
 - Must be:
 - Substantive, not merely procedural
 - Exercised, not merely potential
 - Must have veto
 - No active market participant
- Who is an Active Market Participant?
 - Retired professional?
 - On hiatus? FTC says no.
 - Is indemnification allowed?

NC Dental Board Case: *Other Considerations*

- The “focus of U.S. competition law” is “on protection of competition rather than competitors.” *Spectrum Sports, Inc. v. McQuillan* 506 U.S. 447 (1993).
- “Suppose a market with several hundred licensed electricians. If a regulatory board suspends the license of one electrician for substandard work, such action likely does not unreasonably harm competition.” *FTC Guidance, citing Oksanen v. Page Mem’l Hosp.*, 945 F.2d 696 (4th Cir. 1991).

Lawrence C. Moore, III

704.377.8303

lmoore@robinsonbradshaw.com